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# Reporter's Shield Privilege Is Alive and Well in Missouri, The

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# The Reporter's Shield Privilege Is Alive and Well in Missouri

*State ex rel. Classic III, Inc. v. Ely*[1]

## I. INTRODUCTION

The First Amendment to the United States Constitution[2] and an analogous provision in the Missouri Constitution[3] guarantee individuals the freedom of speech and freedom of the press, among other things. But do these guarantees enable a reporter to withhold the identities of individuals who provided information in confidence in the face of a legitimate civil discovery request? This question confronted the Western District of the Missouri Court of Appeals in *State ex rel. Classic III, Inc. v. Ely*.

In a case of first impression in Missouri, the court upheld a reporter's right to withhold the identities of confidential sources—also known as the reporter's shield privilege—under these circumstances. This privilege is not absolute, as the court explained, but instead, is qualified. Its recognition is contingent upon the proper evaluation of competing interests, namely the public's interest in the free flow of information versus a libel plaintiff's right to prosecute a legitimate claim.[4]

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1. 954 S.W.2d 650 (Mo. Ct. App. 1997).

2. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

3. Article I, section 8 of the Missouri Constitution reads:

> [N]o law shall be passed impairing the *freedom of speech*, no matter by what means communicated; that every person shall be free to say, *write or publish*, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.

MO. CONST. art. I, § 8 (emphasis added).

4. In Missouri, a libel plaintiff who is neither a public official nor a public figure, as were the plaintiffs in *Classic III*, must plead and prove that: (1) the defendant published the defamatory statement; (2) the defendant was at fault in publishing the statement; (3) the statement tended to expose the plaintiff to hatred, contempt, and ridicule; (4) the statement was read by other persons or by the public; and (5) the plaintiff's reputation was thereby damaged. *See* Kennedy v. Jasper, 928 S.W.2d 395, 400 (Mo. Ct. App. 1996); MISSOURI APPROVED JURY INSTRUCTIONS No. 23.06(1) (5th ed. 1996) [hereinafter MAI]. At common law, the tort of libel was subdivided into libel per se and libel per quod. "[Libel] per se referred to a statement whose defamatory nature was apparent upon the face of the publication, whereas [libel] per quod indicated a

## II. FACTS AND HOLDING

Owner-Operator Independent Truck Drivers Association, Inc. and Owner-Operator Services, Inc. ("plaintiffs")[5] filed a libel action against Classic III, Inc., publisher of a monthly magazine entitled *rpm*,[6] and Carl Danbury, the magazine's associate publisher ("relators").[7] Plaintiffs claimed that an article written by Mr. Danbury, published in the April 1995 issue of *rpm*, contained false and defamatory statements about the insurance practices of Owner-Operator Services, Inc.[8]

While performing research for the article, Mr. Danbury had a telephone conversation with an individual who requested that his or her identity remain confidential.[9] Roxanne Campbell, editorial director of *rpm*, also spoke with two other individuals prior to publication of the article and promised to keep their identities confidential as well.[10] Following publication of the April 1995 issue, Ms. Campbell solicited comments about the article from several individuals, again subject to promises of confidentiality.[11] Via depositions and interrogatories, plaintiffs sought to obtain the identities of these individuals.[12] Relators refused such attempts, claiming that the sources were promised confidentiality and that their identities were protected by the reporter's shield

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statement that required resort to extrinsic facts in order to become defamatory." Nazeri v. Missouri Valley College, 860 S.W.2d 303, 308 (Mo. 1993). The significance of this distinction was that libel per se was actionable without proof of special damages, i.e., "a loss of money or of some advantage capable of being assessed in monetary value," while libel per quod generally required proof of special damages. *Id.* Recently in Missouri, the supreme court abolished the common law rules of per se and per quod and required that actual damages, i.e., "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," be proven in all cases. *Id.* at 309 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)). Furthermore, Missouri courts "now consider libel and slander under the single tort of defamation, while retaining many of the common law characteristics of both." *Kennedy*, 928 S.W.2d at 399. *See also* MAI No. 23.06(1), (2).

5. Owner-Operator Services, Inc., ("OOSI"), is a subsidiary of Owner-Operator Independent Truck Drivers Association, Inc., ("OOIDA"), and provides insurance to OOIDA's members. State *ex rel.*, Classic III, Inc. v. Ely, 954 S.W.2d 650, 651 (Mo. Ct. App. 1997).

6. *rpm* is marketed to truck drivers. *Id.*

7. *Id.* at 652.

8. *Id.* The article reported, among other things, that a former OOSI employee had been indicted in Florida for fraud and racketeering. *Id.* at 651.

9. *Id.* at 652.

10. *Id.*

11. *Id.*

12. *Id.*

privilege.[13] Plaintiffs promptly filed a motion to compel relators to reveal the names of the sources.[14]

Plaintiffs did not dispute that relators promised their sources confidentiality, but argued that such promises must yield to legitimate attempts to obtain relevant evidence.[15] The crux of plaintiffs' argument was that relators' lack of reliance on the information gathered from the confidential sources precluded recognition of the reporter's shield privilege.[16] Plaintiffs acknowledged that numerous courts have recognized the reporter's shield, but argued that those decisions were predicated on "the privilege's role in protecting the sources of information *used* by the press in preparation and publication of news stories."[17] From this, plaintiffs' reasoned that recognition of the reporter's shield is inappropriate in situations where, as in this case, the media did not actually use the information gathered from its confidential sources.[18]

The trial court agreed with plaintiffs, and ordered disclosure of the sources' identities, believing such information likely to lead to the discovery of relevant evidence.[19] Relators consequently sought a writ of prohibition from the Western District of the Missouri Court of Appeals barring enforcement of the order.[20] The court of appeals unanimously reversed the trial court and ordered the writ.[21] Although the court did not expressly state, it intimated that the First Amendment to the United States Constitution and Article I, section 8 of the Missouri Constitution grant a reporter's shield privilege in civil cases where confidentiality was promised. More specifically, the court held that a reporter's shield privilege exists in civil actions in appropriate circumstances[22] to protect

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 653. Relators conceded that they did not rely on the sources in preparing the article. *Id.*

17. *Id.* (emphasis added).

18. *Id.*

19. *Id.* at 652. MO. R. CIV. P. 56.01(b)(1) permits parties to obtain discovery of information which is relevant or "appears reasonably calculated to lead to the discovery of admissible (i.e., relevant) evidence." (emphasis added).

20. State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 652 (Mo. Ct. App. 1997). The court of appeals agreed that prohibition was the proper remedy because it enabled determination of the applicability of the asserted privilege. *Id.* at 652-53.

21. *Id.* at 651.

22. The existence of "appropriate circumstances" depends upon the application of a four-factor balancing test adopted by the court to determine whether recognition of the reporter's shield privilege is warranted. This test requires a court to determine: (1) whether the party seeking discovery has exhausted alternative sources of the information; (2) the importance of protecting confidentiality in the circumstances of the case; (3) whether the information sought is crucial to the plaintiff's case; and (4) whether the plaintiff has made a prima facie case of defamation. *Id.* at 655. The court's application of this test is discussed *infra* Part IV.

a publisher from being forced to reveal the identities of confidential sources where confidentiality was in fact promised, regardless of whether the information obtained from such sources was relied on in preparing an allegedly libelous article.[23]

## III. LEGAL BACKGROUND

A reporter first claimed a shield privilege based on the free speech and press clauses of the First Amendment in *Garland v. Torre*.[24] *Garland*, like *Classic III*, involved a defamation action in which a reporter refused to reveal the identities of confidential sources of information in a deposition.[25] The Second Circuit rejected the notion that the First Amendment permitted the reporter to withhold information sought in a legitimate discovery request.[26] The court reasoned that "the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of freedom of the press," and concluded that the public's interest in the free flow of information was tantamount to its interest in the "fair administration of justice."[27]

Since *Garland*, courts have evaluated the propriety of the reporter's shield privilege in three main contexts: grand jury proceedings, criminal proceedings, and civil proceedings. In each of these contexts, as in *Garland*, the decision whether to recognize the shield privilege has involved a balancing of competing interests, pitting the First Amendment's guarantee of the free flow of information to the public against other important societal interests (which are generally specific to the particular context in which the privilege is raised).

### *A. Grand Jury Proceedings*

In *Branzburg v. Hayes*,[28] the United States Supreme Court held that the First Amendment does not enable reporters to withhold the identities of confidential sources or the information they provide from federal or state grand juries.[29] Although the Court acknowledged the legitimacy of the First Amendment arguments in favor of the privilege,[30] it determined that they were

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23. *Classic III*, 954 S.W.2d at 653.

24. 259 F.2d 545 (2d. Cir.), *cert. denied*, 358 U.S. 910 (1958).

25. *Id.* at 547. *Garland* also involved a breach of contract claim, in addition to the libel claim. *Id.*

26. *Id.* at 548.

27. *Id.* at 548-49.

28. 408 U.S. 665 (1972).

29. *Id.* at 689, 709.

30. "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection . . . ." *Id.* at 681. "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not

insufficient to counterbalance those arguments against the privilege, namely the public's interest in the prevention and prosecution of crime.[31] The Court found support for its holding in the fact that such a privilege did not exist at common law as well as the fact that commentators have historically disfavored the creation of new testimonial privileges.[32] The Court also emphasized that it has never invalidated every limited burden on First Amendment rights, such as those involved in *Branzburg*.[33] Moreover, the Court explained that the First Amendment does not grant the press any greater privileges than it grants average citizens, and that just as the First Amendment does not immunize average citizens from grand jury interrogation, neither does it immunize the press.[34] Despite its holding, the Court emphasized that neither Congress nor state legislatures were prevented from statutorily enacting a reporter's shield privilege, nor were state courts prevented from interpreting their respective constitutions to confer such a privilege.[35]

*CBS Inc. (KMOX-TV) v. Campbell*[36] was the first Missouri case to address the reporter's shield privilege in any context. The Eastern District of the Missouri Court of Appeals held that the Missouri Constitution did not provide a shield privilege in grand jury proceedings.[37] The court reasoned: "'It is the solemn and important duty that every citizen owes to his country,' to testify in a grand jury proceeding 'against offenders, against the peace and good order of the community.'"[38] The court also found comfort in the fact that the "secrecy of

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irrational, nor are the records before us silent on the matter." *Id.* at 693. The Court concluded, however, that the notion that refusal to recognize a reporter's shield privilege would undermine the guarantee of freedom of the press "is not the lesson history teaches us." *Id.* at 698. The Court noted that the common law recognized no such privilege, and furthermore that the press had operated, and flourished, in this country for nearly two centuries without one, as no such privilege had even been argued until *Garland* in 1958. *Id.* at 698-99.

31. *Id.* at 695. The Court determined that reporters' concerns are protected to the extent that grand jury proceedings must be conducted in good faith. *Id.* at 707. "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Id.* at 707-08.

32. Branzburg v. Hays, 408 U.S. 665, 685, 690 n.29 (1972). The Court relied on Wigmore, among others, in stating that testimonial privileges "obstruct the search for truth." *Id.* at 690 n.29 (citations omitted).

33. *Id.* at 681-82. "[T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681.

34. *Id.* at 682-83.

35. *Id.* at 706.

36. 645 S.W.2d 30 (Mo. Ct. App. 1982).

37. *Id.* at 33.

38. *Id.* at 32 n.2 (quoting Ward v. State, 2 Mo. 80 (1829)).

the grand jury proceeding ameliorates the harmful effects of disclosure in an ordinary civil or criminal trial."[39]

The court emphasized, however, that its holding was limited to the facts of the case.[40] One of the limiting facts was the absence of a promise of confidentiality. In reaching its decision, the court expressly stated that no claims of confidentiality were involved, and it further identified several cases whose recognition of the privilege in grand jury proceedings were contingent upon the existence of a promise of confidentiality.[41] A second potentially limiting fact was the context in which the privilege was claimed—a grand jury proceeding. The *Campbell* court noted other courts' general willingness to recognize the privilege in civil and criminal proceedings but not in grand jury proceedings.[42] These facts suggest that the *Campbell* court would have interpreted the Missouri Constitution to confer the privilege had the case involved the promise of confidentiality or had the privilege been asserted in a civil or criminal proceeding.

### *B. Criminal Proceedings*

Neither the United States Supreme Court nor any Missouri court has ever determined the applicability of the reporter's shield privilege in a criminal proceeding. However, courts that have done so have generally balanced the public's interest in the free flow of information against the defendant's Fifth and Fourteenth Amendment due process rights to a fair trial and Sixth Amendment right to confront adverse witnesses.[43] Generally, the defendant's due process and

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39. *Id.* at 33.
40. *Id.*
41. *Id.*
42. *Id.* at 32.
43. *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139, 146-47 (3d. Cir. 1980); Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975).

The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without *due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

Section 1 of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

Sixth Amendment rights will preempt any First Amendment interests (*i.e.*, the privilege will be denied) if the confidential information sought is material or relevant to the charged offense or to an asserted defense.[44]

### C. Civil Proceedings

The United States Supreme Court has determined the propriety of the reporter's shield privilege in a civil proceeding on one occasion. In *Herbert v. Lando*,[45] the Court rejected reporters' claims that the First Amendment barred a defamation plaintiff from inquiring into the editorial process.[46] In this case, the plaintiff was a public figure[47] and thus was required to prove that the allegedly defamatory statements were made with actual malice in accordance with the Court's holding in *New York Times Co. v. Sullivan*.[48] The Court determined that

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deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction equal protection of its laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added).

44. *See* United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (holding that the moving party must make a "clear and specific" showing that the confidential documents are highly relevant, necessary, or critical to the maintenance of the claim, and furthermore that the information sought is not obtainable from other sources); United States v. Criden, 633 F.2d 346, 358 (3d Cir. 1980) (holding that disclosure of confidential sources requires a showing of materiality, relevance, and necessity of the information, as well as exhaustion of alternative sources); *see also In re* Shain, 978 F.2d 850 (4th Cir. 1992); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); Romualdo P. Eclavea, Annotation, *Privilege of Newgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R. 3d 37 (1980). Because there is no Supreme Court nor Missouri case on point, this Note will not discuss in detail the status of the shield privilege in criminal proceedings.

45. 441 U.S. 153 (1979).

46. *Id.* at 158, 175. The Court implicitly defined editorial process as "internal communications" between reporters and editors and a "reporter's conclusions about the veracity of the material he has gathered." *Id.* at 171.

47. The plaintiff was a retired Army officer who had received "widespread media attention" for accusing superior officers of concealing information regarding war crimes and other atrocities. *Id.* at 155-56. The plaintiff conceded that he was a public figure. *Id.* at 155-56.

48. 376 U.S. 254 (1964). In *New York Times*, the Court held that in order for a

inquiry into the editorial process was germane to proving the reporter's state of mind—that such statements were made with knowledge of their falsity or with reckless disregard as to their veracity—and therefore must override the shield privilege.[49]

It must be noted that *Lando* involved no promises or claims of confidentiality, nor did the Court discuss the relevance of confidentiality to its holding. As such, *Lando* may plausibly be distinguished from cases like *Classic III* in which confidentiality is established. Notwithstanding such a distinction, the Court's decision in *Lando* is illustrative of its reluctance to enunciate that the freedom of speech and freedom of press clauses of the First Amendment provide the press with a privilege to withhold information in light of countervailing interests.

Federal appellate courts have had eleven different occasions to determine the applicability of a reporter's shield privilege in civil cases where promises of confidentiality were involved. While none of these decisions recognize an absolute privilege to withhold confidential information, all of them hold that a shield privilege exists in certain circumstances, the determination of which must be made on a case-by-case basis.[50]

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public official plaintiff to recover damages for a defamatory statement relating to his or her official conduct, he or she must prove that the statement was made with actual malice, in addition to proving other elements of state defamation claims. *Id.* at 279-80. Actual malice is defined as the publication of a defamatory statement "with knowledge that it [is] false or with reckless disregard of whether it was false or not." *Id.* at 280.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended a similar requirement to public figure plaintiffs, holding that a public figure could only recover upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. The Court has defined public figures as: (1) those who have "general fame and notoriety in the community," i.e., are public figures for all purposes; (2) those who have "voluntarily injected themselves into a public controversy in order to influence the resolution of the issues involved" and are public figures only with respect to that controversy; and (3) "involuntary public figures" who are directly affected by the actions of public officials. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974).

49. Herbert v. Lando, 441 U.S. 153, 160 (1979).

50. Clyburn v. News World Communications, Inc., 903 F.2d 29, 35 (D.C. Cir. 1990); Larouche v. National Broad. Co., 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *In re* Selcraig, 705 F.2d 789, 792 (5th Cir. 1983); Zerilli v. Smith, 656 F.2d 705, 713-14 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596-98 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979); Silkwood v. Kerr-McKee Corp., 563 F.2d 433, 437-38 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974); Baker v. F & F. Inv., 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Cervantes v. Time, Inc., 464 F.2d 986, 994 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See also* Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (stating various circumstances, to be determined on a case-by-case basis, may mandate recognition of a reporter's shield

### D. Shield Laws

Recall that in *Branzburg*, the Supreme Court emphasized that its decision did not preclude Congress or state legislatures from enacting statutory shield privileges.[51] In fact, by the time *Branzburg* was announced in 1972, seventeen states had already enacted some form of statutory protection of a reporter's confidential sources.[52] Since *Branzburg*, nine other states have followed suit.[53] To date, neither Congress nor the Missouri General Assembly have enacted shield statutes of any kind.

## IV. INSTANT DECISION

In *State ex rel. Classic III, Inc. v. Ely*, the court held that, under appropriate circumstances, a reporter's shield privilege exists in civil cases where sources are promised confidentiality, regardless of whether those sources are relied on in compiling the article.[54] In determining whether appropriate circumstances existed in this case, the court observed that other courts have generally focused on the presence or absence of four factors: (1) whether the plaintiffs exhausted alternative sources of information; (2) the importance of protecting confidentiality in the circumstances of the case; (3) whether the information sought is crucial to the plaintiffs' case; and (4) whether the plaintiffs established a prima facie case of defamation.[55] The court adopted this balancing test and applied it to the facts of the instant case.[56]

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privilege where the information sought is not confidential).

51. *See* Branzburg v. Hayes, 408 U.S. 665, 701 (1972).

52. ALA. CODE § 12-21-142 (1995); ALASKA STAT. § 09.25.300 (Michie 1996); ARIZ. REV. STAT. § 12-2237 (1994); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995); 735 ILL. COMP. STAT. § 5/8-901 (West 1992); IND. CODE ANN. § 34-3-5-1 (Michie 1998); KY. REV. STAT. ANN. § 421.100 (Michie 1992); LA. REV. STAT. ANN. § 45:1452 (West 1982); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1995); MICH. COMP. LAWS ANN. § 767.5(a) (West 1986); MONT. CODE ANN. §§ 46-11-307 to -317 (1997); NEV. REV. STAT. § 49.275 (1997); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (Michie 1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992); OHIO REV. CODE. ANN. §§ 2739.04, .12 (Anderson 1992); 42 PA. CONS. STAT. ANN. § 5942 (West 1983).

53. GA. CODE. ANN. § 24-9-30 (1995); MINN. STAT. ANN. §§ 595.021 – .025 (West 1990); NEB. REV. STAT. §§ 20-144 to -147 (1991); N.D. CENT. CODE § 31-01-06-2 (1996); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. §§ 44.510 – .540 (1997); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1997); S.C. CODE ANN. § 19-11-100 (Law Co-op. 1997); TENN. CODE ANN. § 24-1-208 (1997).

54. State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 653 (Mo. Ct. App. 1997).

55. *Id.* at 655.

56. *Id.* The court emphasized that the balancing test is only to be applied where confidentiality was promised to the reporter's sources. *Id.* If the party seeking disclosure disputes the claim of confidentiality, the trial court is to hold an evidentiary hearing to

### A. Alternative Sources of the Confidential Information

Recognition of the privilege requires "[t]he party seeking the information [to] show that his only practical access to crucial information necessary for the development of the case is through the newsman's source. [The] plaintiff[s] must show that they exhausted other means of obtaining the information."[57] The court noted that plaintiffs made no showing that they pursued alternative sources of the information.[58] As to the pre-publication sources, however, the court opined that it would be difficult to find alternative sources of the information supplied by such sources, as it was unlikely that anyone else would have similar information.[59] As to the post-publication sources, the court believed alternative sources of information did exist.[60] "Assuming that the names may have potential relevance to damages, it is evident that similar evidence of damages would be available by contacting any of the thousands of truckers who read the magazine."[61] Hence, as to post-publication sources, the court deemed the existence of alternative sources of information to favor recognition of the shield privilege.[62]

### B. Importance of Protecting Confidentiality

The court's analysis of the second factor entailed a balancing of competing interests. As the court noted:

> The compelled disclosure of confidential sources . . . may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege.[63] On the other hand, if every assertion of confidentiality were to automatically result in a denial of any discovery, then a libel plaintiff's right to discover information which is relevant to his or her claim could also be unduly restricted.[64]

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resolve this factual issue. *Id.*

57. *Id.* at 656 (quoting Riley v. City of Chester, 612 F.2d 708, 716-17 (3d Cir. 1979)).

58. *Id.*

59. *Id.* Curiously, the court did not elaborate on whether such a fact favored recognition of the privilege. Logic dictates that it would not favor recognition of the privilege, at least as to the pre-publication sources.

60. *Id.*

61. *Id.*

62. *Id.* *See supra* text accompanying note 59.

63. State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997). (quoting Cuthbertson v. CBS, Inc., 630 F.2d 139, 147 (3d Cir. 1980)).

64. *Id.* Given these competing interests, the court felt it imperative that the legitimacy of the claim of confidentiality be established before the interests are balanced.

After weighing these competing interests, the court concluded that this factor favored recognition of the privilege.[65] The court emphasized that the risk to the free flow of information to the public was especially high in the instant case because of the magazine's limited audience base.[66] The court noted that *rpm* is a magazine for truckers, read by truckers, and that truckers are frequently the sources of information for articles.[67] The court concluded that forcing relators to reveal the names of their sources would seriously undercut their credibility, thereby hindering their ability to gather information, and ultimately their ability to disseminate information to the public.[68]

### *C. Whether the Information is Crucial to the Plaintiffs' Case*

The court's evaluation of the third factor stemmed from its belief that

> [i]f the confidential source is relied on for an essential point of libel in the article, then the need to identify and question the source is of central importance. By contrast, where the information provided by the source is only of peripheral or collateral importance, then the need for discovery is less strong and the importance of the promise of confidentiality looms larger.[69]

It was undisputed that relators did not actually use or rely on the three pre-publication sources, from which the court concluded that the information gathered from those sources could not have been relied on for an essential point of libel.[70] The court also noted that nothing revealed by post-publication sources could ever be relied on for a point of libel.[71] These conclusions led the court to determine that this factor favored application of the privilege in the instant case.[72]

This determination did not however dispose of the court's analysis of this factor. Plaintiffs argued that because relators did not rely on anything said by their sources, no privilege should attach at all.[73] Plaintiffs contended that such persons could not be *sources* by definition and that the privilege should

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*Id.* Such a determination was not necessary in the instant case because relators' claim of confidentiality had not been contested. *Id.* at 652.

65. *Id.*
66. *Id.* at 656-57.
67. *Id.* at 657.
68. *Id.*
69. *Id.* at 657-58.
70. *Id.* at 658.
71. *Id.*
72. *Id.*
73. *Id.*

automatically not apply.[74] The court rejected this argument primarily because its acceptance "would turn the traditional test for determining privilege on its head." Acceptance of plaintiffs' proposition would produce the absurd result of precluding from discovery sources of information crucial to a libel plaintiff's case, if such sources were relied on in the preparation of an allegedly libelous article, while subjecting sources of peripheral information to potential discovery precisely because they were not relied on.[75] Such a result would contradict the result intended by this factor. Moreover, the court believed that the information gathered from the confidential sources, if not directly relied on in writing the article, may well have been used as background in developing non-confidential sources or retained for future use.[76]

The court additionally noted plaintiffs' inability to cite any authority for its argument, and further identified decisions of other courts rejecting it.[77] Finally, the court concluded that its line of reasoning as to this issue was consistent with that applied by Missouri courts in protecting attorney work-product from discovery in cases other than the one for which the product was created.[78]

### *D. Strength of the Case*

As to the fourth factor, the court explained:

> If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information.... On the other hand, if a case is strong... then the balance may swing in favor of discovery if the harm from such discovery is not too severe.[79]

The court withheld analysis of this factor due to the limited record before it.[80] Such lack of analysis was of no consequence to the court's ultimate decision, however, as the other factors strongly favored recognition of the privilege.[81]

## V. COMMENT

It is difficult to say whether the *Classic III* court's recognition of a qualified reporter's shield privilege was appropriate in this case. Such a determination

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74. *Id.*
75. *Id.*
76. *Id.* at 659.
77. *Id.* at 658.
78. *Id.* at 659.
79. *Id.*
80. *Id.* at 660.
81. *Id.*

depends on the countervailing interests at stake. The *Classic III* court assumed that the identities of relators' confidential sources were relevant to damages.[82] Although this assumption is correct, the court did not specify whether this relevance pertained to compensatory damages, to punitive damages, or to both. Indeed, this distinction is crucial to a proper identification of competing interests and, hence, a correct determination of whether a qualified or an absolute shield privilege should apply.

If the countervailing interest is a private defamation plaintiff's right to prosecute a legitimate claim and thereby repair undue damage to his reputation, such an interest precludes an absolute privilege and alternatively requires a case-by-case analysis to determine when the privilege should prevail and when it should yield.[83] On the other hand, if the countervailing interest is merely a private plaintiff's desire to impose punitive damages, the privilege should therefore be absolute, as such a competing interest can never override those in favor of the privilege. This Comment will examine the relevance of confidential sources to compensatory and punitive damages and will further delineate the type of reporter's shield privilege—qualified or absolute—that should apply relative to the type of damages at issue.

### *A. The Relevance of Confidential Sources to Compensatory Damages*

Any award of damages, whether compensatory or punitive, requires satisfaction of various threshold factors. In Missouri, a defamed plaintiff is entitled to compensatory damages of "such sum . . . as will fairly and justly compensate the plaintiff for any damages . . . he sustained as a direct result" of the defamatory statement.[84] This award, of course, is dependent upon the plaintiff establishing the existence of all of the elements of Missouri's defamation claim.[85] Proving fault on the part of the defendant is perhaps the most difficult element to satisfy.[86] Often, knowledge of the defendant's source

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82. *See* State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997) (assuming that the names may have potential relevance to damages).

83. The analysis and propositions contained in this Note pertain only to cases involving a private defamation plaintiff, as in *Classic III*. This Note does not purport to extend its analysis to the public official or public figure plaintiff arena.

84. Kennedy v. Jasper, 928 S.W.2d 395, 400 (Mo. Ct. App. 1996) (quoting MAI No. 4.15). Compensatory damages include actual or general damages "imposed for the purpose of compensating the plaintiff for the harm that the publication caused to his reputation," special damages for "the loss of something having economic or pecuniary value," and damages for emotional distress and bodily harm. RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1976).

85. *See supra* note 4 and accompanying text.

86. In *Gertz v. Robert Welch*, 418 U.S. 323, 324 (1974), the Supreme Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 323.

may be the only evidence indicative of fault. For example, a reporter's reliance on sources of questionable credibility or veracity in compiling an allegedly defamatory article could constitute the requisite level of fault. If the reporter relied exclusively on these sources in publishing the article, there would be no other way for the plaintiff to prove fault except through knowledge of these sources.

On the other hand, punitive damages may be awarded in Missouri "for conduct that is outrageous, because of defendant's evil motive and reckless indifference to the rights of others."[87] In the defamation context, a showing of actual malice satisfies this standard.[88] Knowledge of the identities of confidential sources will often be the only way to prove actual malice, since the credibility of these sources, as gleaned from knowledge of their identities, is highly indicative of whether the alleged defamatory statement was published with knowledge of its falsity or reckless disregard as to its veracity.[89]

### *B. The Propriety of the Privilege When Fault is at Issue*

If a private plaintiff contends that ascertainment of the identities of confidential sources is necessary to prove fault, the privilege should not be absolute; rather, the competing interests should be balanced because they are equally strong. Although the right of a reporter to withhold the identities of confidential sources is undoubtedly an interest subsumed by the First Amendment, it does not command the full panoply of that amendment's protection. The compelled disclosure of confidential sources "involve[s] no intrusion[] upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."[90] As such, the reporter's shield privilege's First Amendment protection is not impenetrable by a strong countervailing interest.

Indeed, a strong countervailing interest lies in the reparation of undue damage to a person's reputation as a result of a defamatory statement, a function

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87. Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)). "Punitive damages are not a matter of right but rest in the discretion of the trier of fact." *Kennedy*, 928 S.W.2d at 401.

88. A showing of actual malice, while not required by a plaintiff who is neither a public official nor a public figure, may give rise to punitive damages. *Kennedy*, 928 S.W.2d at 400.

> [T]he trier of fact may award punitive damages if it finds the issues in favor of [the] plaintiff and if it believes [the] defendant published the defamatory [statement] with knowledge that it was false or with reckless disregard for whether it was true or false at a time when [the] defendant had serious doubts as to whether it was true.

*Id.*

89. Recall that in *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court noted that inquiry into the editorial process may be necessary to prove actual malice. *Id.* at 160.

90. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

performed exclusively by compensatory damages. The importance of protecting one's good name is evidenced by the Supreme Court's traditional placement of defamatory statements outside of the realm of First Amendment protection[91] (although *New York Times* and its progeny have accorded various degrees of First Amendment protection to certain allegedly defamatory statements).[92] Therefore, when the defendant's fault is at issue, a balance exists in the abstract between a freedom of press interest which receives limited First Amendment protection and a freedom from speech interest which is largely free of First Amendment obstacles.

The proper evaluation of these competing interests is not the four-factor balancing test utilized by the *Classic III* court, but rather a variation of that test. The *Classic III* test is improper because it preliminarily favors the privilege in that it presumes that, all things being equal, the First Amendment interests outweigh those of a defamation plaintiff.[93] Three aspects of this approach evince this bias. First, the test presumes that alternative sources of the confidential information exist, which thereby makes it more likely that the privilege will be recognized.[94] Second, it makes the importance of protecting confidentiality a

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91. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, (1942), the Supreme Court stated:

> [T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, *the libelous*, and the insulting or "fighting" words . . . .

*Id.* at 571-72 (emphasis added).

92. *New York Times v. Sullivan Co.*, 376 U.S. 254, 267 (1964), requires defamation plaintiffs who are public officials to prove actual malice in order to recover damages. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), extends the *New York Times* requirement to public figure-plaintiffs. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974), prohibits states from (1) imposing liability for defamatory statements without a showing that the defendant was at fault in publishing such a statement, (2) permitting recovery of presumed damages without proof of actual harm or actual malice, and (3) permitting recovery of punitive damages without a showing of actual malice. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), requires that an allegedly defamatory statement be proven false in order to recover damages against a media defendant for speech of public concern. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990), accords allegedly defamatory statements of opinion full First Amendment protection unless they can be demonstrated to contain provably false factual information.

93. This author disagrees with this presumption, and alternatively submits that the conflicting interests are equally important for the reasons previously mentioned.

94. With regard to whether alternative sources of the confidential information exist, the *Classic III* court required "[t]he party seeking the information [to] show that his only practical access to crucial information necessary for the development of the case is through the newsman's source," State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997) (quoting Riley v. City of Chester, 612 F.2d 708, 716-17 (3d Cir.

factor relevant to the evaluation of the competing interests. The mere existence of this factor favors recognition of the privilege, however, as there is always an interest in protecting confidentiality. Third, the test unjustly requires plaintiffs to refute the reporter's claims of confidentiality.[95] Such a requirement is futile because a plaintiff who is ignorant of the identities of a reporter's sources will likewise be ignorant of any genuine promises of confidentiality extended to such sources.

A more appropriate balancing test would require the trial court to ultimately determine whether compelled disclosure of a reporter's confidential sources is necessary for a plaintiff to prove fault.[96] This determination can be made by evaluating three factors: (1) whether alternative evidence of fault exists; (2) whether the plaintiff has made an otherwise prima facie case of defamation; and (3) whether an extraordinary interest in protecting confidentiality exists. The trial court's determination is to be based on the totality of the factors in light of the circumstances of each case. In other words, the factors do not necessarily carry equal weight, and their relative weights may fluctuate from one case to the next.

In contrast to the *Classic III* court's balancing approach, this test presumes that the competing interests are equally strong in the abstract. Therefore, both sides are required to adduce evidence without the benefit or detriment of any underlying presumptions. If, after application of the test, the trial court determines that fault can be proven in the absence of disclosure, or that other factors preclude disclosure even though knowledge of the sources' identities is necessary to prove fault, disclosure will not be compelled. However, if disclosure is necessary to prove fault and no extraordinary reason to prohibit disclosure exists, disclosure will be compelled and the reporter's shield privilege will not be recognized.

This approach is more effective than that adopted and utilized by the *Classic III* court because it specifically accommodates the elements of Missouri's defamation claim, thereby confining a court's analysis to a more pertinent framework. Furthermore, it dispenses with the unjust requirement that

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1979)), and further stated that the trial court "should not be required to make the delicate balance of interests required by the privilege unless the [movant] first shows that he is unable to acquire the information from another source . . . ." *Id.* (quoting United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir. 1980)). These requirements create a presumption that the privilege will prevail unless the movants make the required showing; the reporters are not required to show that other sources exist, at least not initially.

95. *See Classic III*, 954 S.W.2d at 656 ("[T]he court should evaluate whether the claimed need for confidentiality is real, or whether, for instance, the reporter simply automatically promised confidentiality as part of a blanket effort to stymie any future attempt at discovery.").

96. This test requires the reporter to be a party to the lawsuit. Where a party seeks to compel disclosure of the confidential sources of a reporter not a party to the suit, the reporter's shield privilege should be absolute, given that nondisclosure would not be a hindrance to a plaintiff's ability to prove the elements of a defamation claim.

a plaintiff engage in futile attempts to disprove confidentiality in order to swing one of the factors in his favor. Finally, it places the competing interests on level ground, and requires the adverse parties to justify why their interest should prevail in the absence of any presumptions. Since the conflicting interests truly are equally important in the abstract, this approach more adequately ensures that the proper interest will prevail in light of the particular facts of a given case.[97]

### C. *The Propriety of the Privilege Where Fault is Not at Issue*

If fault is not at issue, or if the trial court determines that disclosure is otherwise inappropriate after weighing the competing interests, then further attempts to ascertain those sources' identities are only relevant to the imposition of punitive damages. When this is the case, the interests in opposition to the recognition of the reporter's shield privilege are weakened to the point where they can never override those in favor of the privilege. In other words, where the sole relevance of the identity of a reporter's confidential source pertains to the imposition of punitive damages, the reporter's shield privilege should always be recognized.

The separate functions performed by compensatory and punitive damages support this conclusion.

> The tort law of libel and slander has been conceived of serving three separate functions: (1) to compensate the plaintiff for the injury to his reputation, for his pecuniary losses and for his emotional distress, (2) to vindicate him and aid in restoring his reputation and (3) to punish the defendant and dissuade him and others from publishing defamatory statements. The traditional remedy has been an award of damages, whether compensatory, nominal, or punitive.[98]

Recall that, in civil defamation proceedings, the primary interest in opposition to the recognition of the privilege is a defamed plaintiff's right to prosecute his claim and thereby repair undue damage to his reputation. Compensatory damages perform this function by returning the plaintiff to the condition he was in prior to the publication of the defamatory statement. In the words of the Restatement (Second), compensatory damages "vindicate [the plaintiff] and aid him in restoring his reputation," as well as "compensate . . . for

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97. This author does not attempt to reevaluate the dispute in *Classic III* by way of the proposed balancing test, because the court's opinion likely does not contain all relevant facts or present all possible competing arguments. The proposed test is simply offered as a more proper analytical device than that utilized by the *Classic III* court, irrespective of whether it would yield the same result.

98. RESTATEMENT (SECOND) OF TORTS § 623 special note (1976).

his pecuniary losses and for his emotional distress . . . ."[99] Punitive damages, on the other hand, serve to "punish the defendant and dissuade him and others from publishing defamatory statements."[100] By definition, punitive damages play no role in restoring a defamed plaintiff's reputation; they only serve to punish the defendant and to deter similar conduct in the future. Therefore, barring a plaintiff from receipt of punitive damages can never interfere with his ability to protect and restore his good name.

Two legal rules in Missouri provide further support for this notion. First, punitive damages may be awarded only upon a showing of outrageous or reckless conduct,[101] and then only in the trier-of-fact's discretion.[102] This is in stark contrast to compensatory damages, which inure as a matter of right to a defamed plaintiff. Second, fifty percent of "any final judgment awarding punitive damages shall be rendered in favor of the state . . . ."[103]

Both rules signify that although punitive damages serve a proper role in tort law by punishing a plaintiff whose culpability exceeds mere negligence,[104] they constitute a windfall to the plaintiff since his injuries are not repaired to any greater extent than by compensatory damages. When a defamation plaintiff seeks to avail himself of punitive damages, then, the sole competing interest in opposition to the shield privilege is his desire to punish the defamer. This author fails to see how the punishment of a wrongdoer, once the plaintiff has been made whole via compensatory damages, could ever counterbalance "the broad societal interest in a full and free flow of information to the public."[105] Hence, to engage in any sort of balancing process is unnecessary under these circumstances and

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99. *Id.*

100. *Id.*

101. "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others." Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).

102. "Punitive damages are not a matter of right but rest in the discretion of the trier of fact." Kennedy v. Jasper, 928 S.W.2d 395, 401 (Mo. Ct. App. 1996).

103. MO. REV. STAT. § 537.675(2) (1994). This award goes to the Tort Victims Compensation Fund, with procedures for disbursement to be promulgated by the Missouri General Assembly. *See* MO. REV. STAT. § 537.675(1), (4) (1994). However, no such procedures have yet been enacted.

104. There are two basic theories of punishment: utilitarianism and retributivism. *See* Joshua Dressler, UNDERSTANDING CRIMINAL LAW 9-11 (1994). Utilitarianism posits that the purpose of punishment is to maximize the net welfare of society, via the deterrence of future wrongful conduct and rehabilitation of wrongdoers. *Id.* Utilitarianists believe that punishment is not justified if it does not serve this end. *Id.* Retributivism, on the other hand, maintains that punishment is imposed because wrongdoers are deserving of such, irrespective of its effect on net social welfare. *Id.*; *see also Kennedy*, 928 S.W.2d at 400 ("[P]unitive damages serve to punish an actor and deter others from like conduct.").

105. Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

the reporter's shield privilege should therefore be absolute and applied without exception.

## VI. CONCLUSION

The reporter's shield privilege enables members of the media to withhold the identities of confidential sources amid legitimate requests for such information in grand jury, criminal, or civil proceedings. The privilege is founded upon the free speech and free press clauses of the First Amendment to the United States Constitution and similar provisions in state constitutions. Its underlying rationale is that it ensures the free flow of information to the public by preserving the integrity of the relationships between a reporter and his sources. Despite the formidability of the privilege's progenitors, the privilege itself has not been commensurately robust. For example, in *Branzburg v. Hayes*, the U.S. Supreme Court subjugated the interests underlying the privilege to the public's interest in the prevention and prosecution of crime and held that the privilege should not be recognized in grand jury proceedings despite its First Amendment origins. In *CBS, Inc. (KMOX-TV) v. Campbell*, the Eastern District of the Missouri Court of Appeals reached a similar conclusion interpreting the Missouri Constitution. In criminal proceedings, the privilege often yields to the defendant's Fifth and Fourteenth Amendment due process rights to a fair trial and his Sixth Amendment right to confront adverse witnesses.

However, in *State ex rel. Classic III, Inc. v. Ely*, the Eastern District of the Missouri Court of Appeals recognized a qualified reporter's shield privilege in civil defamation cases. *Classic III* requires courts to evaluate four specific factors to determine whether the privilege should be recognized in a particular case. This case-by-case analysis is appropriate in cases where the identities of confidential sources are critical to the plaintiff's ability to recover compensatory damages. Conversely, where these identities are of minimal value to the plaintiff's ability to recover compensatory damages but remain material to an award of punitive damages, an absolute reporter's shield privilege should exist.

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